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	Distribution: ☒ DHS Child Welfare Staff; ☒ Private Agency Child Welfare Staff; ☒ CSA Central Office Managers/Staff; ☒ Native American Tribes; ☐ Data Management; ☒ Other: BSC and County Directors; ☒ BCAL; ☒ CWTI; ☒ SACWIS

On June 25, 2013, the Supreme Court of the United States (SCOTUS) rendered a decision in the *Adoptive Couple v. Baby Girl* (aka Baby Veronica Case of South Carolina) contested Indian Child Welfare Act (ICWA) adoption case before the court.

Summary:

1) The Supreme Court of the United States (SCOTUS) upheld the constitutionality of the Indian Child Welfare Act (ICWA). It remains intact.
2) The SCOTUS ruled that two specific provisions of the ICWA do not apply to protect a biological parent when that parent does not, and has not in the past, enjoyed legal or custodial rights to the Indian Child. Section 1912(d), requiring active efforts be made prior to the termination of parental rights to an Indian Child, and section 1912(f), requiring heightened burdens and evidence before a termination of parental rights may be ordered, do not apply. These provisions contain language protecting the "continued custody of the child" and "prevent[ing] the breakup of the Indian family." SCOTUS concluded that the statutory language was clearly intended to protect Indian families and parents with an existing (or prior) custodial relationship with the Indian Child. Where none exists, the ICWA protections offered by these two sections, do not apply.
3) The SCOTUS further ruled that section 1915(a), prescribing placement preferences in adoption proceedings involving Indian Children, did not apply here because no "placement preference party" formally sought to adopt. A placement preference is just that, a preference between alternatives. Where, like here, the only party formally seeking to adopt is a non-preference party, section 1915(a) does not apply because there is no decision for the preference to resolve.
4) The SCOTUS reversed and remanded the case back to the lower court in South Carolina for further proceedings.
5) The South Carolina Supreme Court remanded the case back to the Family Court with instructions to finalize the adoption.
6) Baby Veronica potentially could return to the Adoptive Couple after nearly two years with her biological father and extended family given the SCOTUS decision.

For Michigan:

1) The Baby Veronica SCOTUS decision is an important reminder that proper notice to tribe, active efforts, and placement priorities are critical to Indian children in care; as well as the engagement of biological fathers for all children.
2) Michigan DHS Native American Affairs (NAA) policy is best-practice for Indian Child Welfare and the SCOTUS decision will not change procedures or practice at this time.

The following link to the National Indian Child Welfare Association (NICWA) website may be utilized to access an AG v BG Webinar explaining the Baby Veronica SCOTUS decision in great detail (See attached AG v BG Webinar PowerPoint Presentation for written version): http://www.nicwa.org.

Additional resources are available to ensure all staff are familiar with laws, materials on Indian child welfare, and DHS Native American Affairs policy for Michigan on the DHS public website policy pages/DHSNet or Native American Affairs (NAA) website at http://www.michigan.gov/americanindians.

NICWA
National Indian Child Welfare Association
Protecting our children • Preserving our culture

Adoptive Couple v. Baby Girl:

A Webinar Review of the Decision

Addie Smith, JD, MSW, NICWA Government Affairs Associate

5-4 decision: Almost a plurality

- **Majority: written by Justice Alito**
  - Thomas concurrence in full w/ additional constitutional analysis
  - Breyer concurrence with observations that narrow the opinion
- **Dissent: written by Justice Sotomayor**
  - Scalia concurring with dissent with additional interpretation and assertion of father's rights

Only the Majority opinion becomes the law

Who were the parties?

- Petitioners
  - Adoptive Couple
  - Guardian Ad Litem
- Respondents
  - Father
  - Cherokee Nation

Overview of Majority Opinion

- 3 of ICWA's provisions are narrowed
  - 1912(d)- involuntary termination requirements
  - 1912(f)- involuntary termination standard
  - 1915(a)- placement preferences
- Because the SC decision relied on the provisions above, it was reversed
  - The case was remanded to SC to determine custody and placement of Veronica
- ICWA as a whole was upheld as a valid act of Congress

Quick Review of the Facts

- Dusten and Mother were engaged
- 1 month later Veronica was conceived
- After learning of pregnancy Father tried to move wedding up—to support mother
- Mother broke off engagement

Quick Review of the Facts

- Text messages were exchanged
- Mother, **without** informing father placed Veronica for adoption
- **Incorrect** notice was sent to Cherokee Nation
- Immediately after Veronica's birth she was moved to a pre-adoptive placement in SC

Quick Review of the Facts

- 4 months after Veronica's birth Dusten received notice of the pending adoption
- The next day father contacted a lawyer and requested a stay of the adoption proceedings
  - He stated that he sought custody and did not consent to the adoption
  - His paternity was confirmed via paternity test

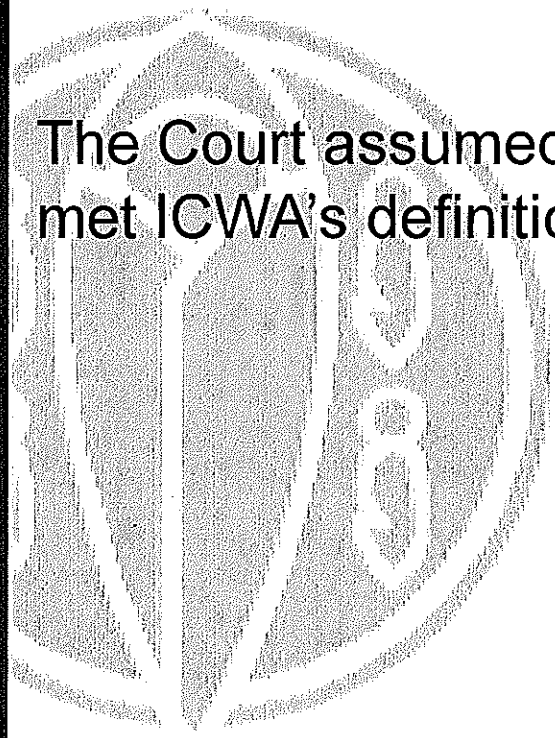
Lower Court Decision

The South Carolina Court(s) found that his paternity could not be involuntarily terminated because of the protections provided in ICWA 1912(d)&(f), denied the adoption, and gave father custody

Questions Before the Court

- Does ICWA's definition of "parent" require unwed fathers to meet state law requirements to "acknowledge or establish" paternity?
- Does ICWA apply when the child is not a part of an existing Indian family?

Question 1: Paternity



The Court assumed without deciding that Dusten met ICWA's definition of "parent"

Question 1: Paternity

Effect on this case:

- The Court found that even if Dusten were a "parent" under ICWA it wouldn't matter because he would still not be protected by the provisions of ICWA that he argued would prevent the TPR/adoption

Effect on future cases:

- The interpretation of "acknowledge or established" under ICWA will be state by state

Question 2: EIF Exception

The Existing Indian Family Exception was **not** accepted "whole cloth"

- The broad EIFE that looks for "an existing Indian family" before applying ICWA was not accepted.

- The California Constitutional EIFE that looks for a family who is "Indian enough" before applying ICWA was not accepted.

Question 2: EIF Exception

"EIFE lite" was created/ accepted by the Court

- This interpretation is based on statutory interpretation.
- This interpretation only limits the rights of parents under 2 provisions of ICWA , the other protections of ICWA still apply to these parents.

Question 2: EIFE Lite

No termination of parental rights may be ordered … in the absence of a determination, supported by evidence *beyond a reasonable doubt*…that the continued custody of the child by the parent… *is likely to result in serious emotional or physical damage to the child.*

25 U.S.C. § 1912 (f)

- The Court found that these TPR protections only apply when a parent has legal or physical custody of the child at the time of the TPR/Adoption
- The Court found that Dusten, under state custody laws in OK/SC had neither legal or physical custody, at the time of the TPR/Adoption

Question 2: EIFE Lite

Effect on this case:

- The decision of the SC courts that Dusten's rights could not be terminated based on the standards of this provision of ICWA is reversed

Effect on future cases:

- Parents who do not have legal or physical custody at the time of a TPR/Adoption may not have the protection of the ICWA standards
- Breyer warns that this could exclude "too many" fathers, and narrows the circumstances
- Questions about QEW, 1912(e)

Question 2: EIFE Lite

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed **to prevent the breakup of the Indian family** and that these efforts have proved unsuccessful.

25 U.S.C. § 1912 (d)

- The Court found that this TPR protection is not required to prevent the break up of an Indian family when a parent abandons a child before birth and has never had physical or legal custody of the child
- The Court found that Dusten, had abandoned the child and never had physical or legal custody

Question 2: EIFE Lite

Effect on this case:

- The decision of the SC courts that Dusten's rights could not be terminated because no active efforts under ICWA were provided is reversed.

Effect on future cases:

- Parents who have abandoned their child and had no physical or legal custody are not guaranteed Active Efforts before TPR.
- Breyer warns that this could exclude "too many" fathers, and narrows the circumstances.
- Questions foster care.

Additional Issue Raised: Placement Preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1912 (a)

- The court found that these are not triggered until a "competing" family has filed for an adoption

Additional Issues Raised: Placement Preferences

Effect on this case:

- If Cherokee changes their placement preferences to include "non-custodial" fathers, Dusten could have a right to adopt Veronica that trumps the pre-adoptive couple (Breyer).
- If Dusten's family, or a Cherokee citizen, or an Indian family files to adopt Veronica they could have a right to adopt Veronica that trumps the pre-adoptive couple.

Effect on future cases:

- For <u>private</u> adoptions social workers no longer have a legal obligation under federal law to seek out family/tribal members/Indian families.

- Questions about state laws, best practices, other federal law that protect child welfare kids.

Constitutional Issues

- Majority–"Such an interpretation would raise equal protection concerns"
  - If a father abandons a child and refuses to pay any support, maybe helps decide to place the child for adoption, then last minute "plays the ICWA trump card" to override mothers decision.
- Thomas– Maj. Concurrance
  - Constitutional Avoidance and Indian Commerce Clause argument

Dissent

- Disagrees with the narrow interpretation of the terms "continued custody" and "breakup"
  - Making a strong argument that ICWA must be read as a whole and that the continued parent-child relationship is to be protected
- Questions that if the majority is willing to assume dad is a parent why wouldn't he get all the protections of the act, why would they parse the protections out
- Finds Alito's EP comment to be "contrary to precedent and unnecessary to the analysis"
- Scalia–"continued" can be future looking, parents rights are to be recognized

What Happens when the Supreme Court interprets a statute?

- If based on the Constitution then
  - The federal statute, and likely any similar state statutes, cannot be interpreted any other way by any other court; or it must be struck down.
  - The interpretation cannot be changed/corrected by Congress.
- If it is based on statutory interpretation then
  - The federal statute cannot be interpreted any other way by any other court.
  - The interpretation can be changed/corrected by Congress.

Questions?